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No. 84-1938

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GABRIEL ENERGY CORPORATION, - Petitioner

versus

DONALD P. HODEL, Secretary of the Interior, Et Al. - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether a privately owned mineral estate in a tract in which the United States owns the surface estate is "Federal lands" as that term is used in 30 U.S.C. 1272(e)(2) and defined at 30 U.S.C. 1291(4) and whether the provisions of 30 U.S.C. 1272(e)(2) pertaining to "Federal lands" can be applied to such a privately owned mineral estate.

II. Whether a tract referred to in Question I above but which is totally outside of a national forest boundary established by presidential proclamation is "within the boundaries of any national forest" as that phrase is used in 30 U.S.C. 1272(e)(2).

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Statutory Provisions Involved	1–2
Reply of Petitioner	2–8
Question I	2–8
Question II	8–9
Conclusion	9

TABLE OF AUTHORITIES

Cases: PAGE

Clark Dist. Co. v. *Western Md. R. Co.*, 242 U. S. 311 (1916) 5

Hodel v. *Indiana*, 452 U. S. 314, 332 (1981) 5, 6

Sec. of Agriculture v. *Central Roig Ref. Co.*, 338 U. S. 604 (1950) 5

Williamson County Regional Planning Comm'n v. *Hamilton Bank*, No. 84-4 (June 28, 1985)..... 7

Constitution and Statutes:

Commerce Clause, U. S. Const., Art. I, Section 8, cl. 3 6

Property Clause, U. S. Const., Art. IV, Section 3, cl. 2 .....3, 5, 6

Due Process Clause, U. S. Const., Amend. V 6

Just Compensation Clause, U. S. Const., Amend V.. 7

30 U.S.C. 1257(1), (2), & (9) 1–2, 7

30 U.S.C. 1272(e)(2) 3, 4, 9

Miscellaneous:

Opinion by Office of the Solicitor, 88 I.D. 909, 912 (1981) 7

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REPLY FOR PETITIONER

STATUTORY PROVISIONS INVOLVED

30 U.S.C. 1257 provides in pertinent part:

> (b) The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain among other things —
>
> (1) The names and addresses of (A) the permit applicant; (B) every legal owner of record of the property (surface and mineral), to be mined; (C) the holders of record of any leasehold interest in the property; (D) any purchaser of record of the property under a real estate contract; and (E) the operator if he is a person different from the applicant; and (F) if any of these

are business entities other than a single proprietor, the names and addresses of the principals, officers, and resident agent;

(2) the names and addresses of the owners of record of all surface and subsurface areas adjacent to any part of the permit area;

* * *

(9) the applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: PROVIDED, That nothing in this chapter shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.

* * *

REPLY FOR PETITIONER

QUESTION I

The Government says that Gabriel Energy Corporation's (Gabriel) privately owned mineral estate is "federal land", i.e., "any land, including mineral interests, *owned by* the United States [emphasis added]". Gabriel says its privately owned mineral estate is not federal land. That is the whole issue.

Though the applicability of the Section in question, 30 U.S.C. 1272(e)(2, is expressed solely in terms of property and proprietary interests, the Government would have the character of the property interests involved ignored. The Government's only response to the essential property question is by its conclusory assertion that the Property Clause (and thus necessarily the character of the property interest involved) does not apply to the proprietary standard set out in the statute. Respondent's Brief at 15.

The Government does discuss the property question as if the interests involved were two separate layers of earth, one lying on top of the other, but it cites no authority at all for that definition of property which in total opposition to all of the state and federal authority which has been cited in the Petition.

Gabriel's interest does not "underlie" the federal interest. Each is a separate and distinct interest in a single tract and the two interests mutually define one another. The United States does own the surface estate unquestionably, but that is not the topmost layer of earth as the Government implies. The description of the interests involved is not just a form of expression. Unless the legal interest to which the statute is directed is correctly identified, the object to which Congress applied the statute cannot be reached.

In its discussion of the character of the property interests involved, Gabriel has not used the word ''absolute'' though the Government responds as if it had and as if that word were critical and the whole argument.

Respondent's Brief at 8. The Government seems to treat the word "absolute" as if the Petitioner were claiming that it may, whenever it wishes, act out some unbridled whimsy. Gabriel, of course, makes no such claim.

Though the word "absolute" is not itself essential, the rights which Gabriel has asserted are, however, "absolute" in the sense that they are property rights. If property and property interests do not have a fixed character and meaning, then there is no such thing as property. Indeed, a right, whether a property right or not, which has no fixed reliable meaning and character would be no right at all. It would be nothing more than a mere rhetorical device of no genuine legal or social significance.

At page 10 of the Government's Response in responding to the Stearns and Ramex Petition, the Government claims that the Petitioners seek to have Kentucky law somehow change the federal law. Gabriel certainly makes no such effort. Gabriel seeks nothing more than to be regulated in the same way that all other owners of privately owned mineral estates are regulated.

By its own words, the statute, 30 U.S.C. 1272(e)(2), applies only to certain property interests. Kentucky law defines the property interests involved and Kentucky law is cited for that purpose and that purpose alone. Without reference to the definition of the thing to which the statute applies, no rational application of the statute could be made.

While deprecating the reference to Kentucky law, the Government has ignored the parallel reference to federal law in the Gabriel Petition (84-1938) which defines the property interests involved in just the same way as Kentucky law does.

There is no question of changing the statute involved, but a determination must be made under existing law of what property or property interests come within its terms.

The Government would dispose of all the questions concerning the character of property and its treatment under the Property Clause by a single unsupported assertion that a "claim of arbitrariness cannot rest solely on a statute's lack of uniform geographical impact." Respondent's Brief at 15. Gabriel has not based any claim on a lack of geographic impact. There is no question of geographic impact relevant to this controversy. Geography is not involved.

There is nothing in the statute involved here that would apply to specifically designated regions. *Sec. of Agriculture* v. *Central Roig Ref. Co.,* 338 U. S. 604 (1950); nor does it apply throughout the various states where it is invoked. *Clark Dist. Co.* v. *Western Md. R. Co.,* 242 U. S. 311 (1916); nor does it apply to specific physical features that occur with varying frequency in different parts of the country. *Hodel* v. *Indiana,* 452 U. S. 314, 332 (1981). The distinction of the statute involved here is based solely on ownership, not on geography. It applies only to certain property which a single owner owns an interest. It

does not apply to forests generally wherever they might be. It does not even apply to all property within the proclaimed boundaries of the national forest. It applies only to certain land owned by the United States. The fact that all land owned by the United States is located somewhere does not make the distinction geographic. If that were a geographic distinction, every classification that might ever be made would be geographic and thus valid because everybody and everything must be domiciled or located somewhere. The issues involved here were not involved in *Hodel* v. *Indiana,* 452 U. S. 314. That case dealt only with general provisions. *Hodel* did not consider any classification based on ownership.

The classification involved here would fail under the Commerce and Due Process Clauses for the reasons discussed in Gabriel's Petition (84-1938) and the single effort of the Government to denominate it a geographical classification will not save it.

Because the statute involved here, would apply to activity on federal land and to nothing else, the statute must be examined as an exercise of the Property Clause and its application must meet the requirements of the Property Clause.

The Government continues to argue that the "taking claim is premature". Respondent's Brief at 15. But there is no taking claim. Gabriel commenced its action in the District Court, not in the Court of Claims; it has never made a claim for compensation. Gabriel's complaint prays only for a declaration of rights and a

permanent injunction. That is all Gabriel has ever sought and that is what it is seeking now. The Government's reference to *Williamson County Regional Planning Comm's* v. *Hamilton Bank,* No. 84-4 (June 28, 1985), Respondent's Brief at page 15, is totally inapposite because the issues involved in that case are not involved here. That case involved a claim for compensation and this case does not. The Government's reference to the Compensation Clause is a red herring that would draw attention away from the genuine issues before the Court.

The Government argues as if all it seeks is to have Petitioner make a "prior showing" of its right to mine. Respondent's Brief at 11. That is not what is involved here. The Act* requires that every permit application made to any regulatory authority show the applicant's right to mine and the instrument which is the source of that right. 30 U.S.C. 1257(b)(1), (2) and (9). Gabriel has done that. What the Government is actually seeking is to convert the vested property interest in which the Petitioner has a leasehold converted into a "valid existing right" which it has defined as "a statutory interest inferior to a legal or equitable interest" subject to the discretion and policy of the Secretary of Agriculture. Opinion by the Office of the Solicitor, 88 ID 909, 912 (1981), cited in Gabriel Petition at page 7 (84-1938).

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*Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201-1328.

The issue here clearly is whether or not the Petitioner's privately owned mineral estate will be treated as "land owned by the United States".

The Government's argument is that any question of whether or not the statute is applicable in this instance can be avoided simply by applying the statute. The Government argues that by forcing the Petitioner to seek a determination applicable only to federal land any question of whether or not federal land involved is rendered unnecessary. That argument begs the question. The only question here is whether or not the Petitioner's private property can be treated as land owned by the United States and subjected to determinations applicable only to land owned by the United States or whether that question can be avoided altogether by disregarding the authority which the Petitioner has cited and summarily treating the property as if it were land owned by the United States.

QUESTION II

In discussing the boundary question in Argument II, the Government would somehow find the intent of the Congressional Act without any reference to the law regarding the reading and resolving of statutes. Respondent's Brief at 16-18.

The Congress has previously fixed the meaning of "boundary" of a national forest as the boundary established by presidential proclamation. It is not the naming of the forest, but the establishment of the boundary by presidential proclamation that is relevant here. When Congress used the phrase "boundaries of any

national forest", 30 U.S.C. 1272(e)(2), it made a distinction between inside and land outside that boundary. That is the only distinction that it made.

CONCLUSION

Indeed, that is the approach the Government has taken to the entire controversy. The Government would assume new meanings for the established words that Congress has used in the statute and then consider the words isolated from the body of law that has established the meaning.

The unwillingness of the Government to deal with issues in this controversy demonstrates the extent and depth of the controversy: It demonstrates that the real thing in issue is the definition of property, whether involving mineral rights or not, and the radical change that would come into the concept of property if the decision of the Court of Appeals is upheld. For that reason, a writ of certiorari should be granted.

Respectfully submitted,

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